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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

SURGICAL INSTRUMENT SERVICE  
COMPANY, INC.

*Plaintiff/Counter-Defendant,*

v.

INTUITIVE SURGICAL, INC.,

*Defendant/Counterclaimant.*

Case No. 3:21-cv-03496-VC

Honorable Vince Chhabria

**PLAINTIFF SURGICAL  
INSTRUMENT SERVICE COMPANY,  
INC.'S OPPOSITION TO  
INTUITIVE'S MOTION TO EXCLUDE  
DR. RUSSELL LAMB'S EXPERT  
OPINION TESTIMONY**

Hearing: June 8, 2023

Time: 10:00 AM PT

Courtroom: Courtroom 5, 17th Floor

Judge: The Honorable Vince Chhabria

Complaint Filed: May 10, 2021

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# MEMORANDUM OF POINTS AND AUTHORITIES

2 In its motion to exclude certain opinions proffered by Dr. Russell Lamb, Intuitive  
3 does not challenge Dr. Lamb's qualifications or whether his testimony would be helpful to  
4 the jury as to his opinions on economic issues. For the most part, the motion to exclude  
5 focuses on the reliability of his methodology and argues that certain of his opinions are  
6 contrary to law.

7 Reliability requires that the expert’s testimony have a reliable basis in the  
8 knowledge and experience of the relevant discipline. *United States v. Ruvalcaba-Garcia*,  
9 923 F.3d 1183, 1188-89 (9th Cir. 2019). The district court must assess whether the expert  
10 has employed in the litigation context the same level of intellectual rigor that characterizes  
11 the practice of an expert in the relevant field. *Id.* at 1189. The reliability analysis is “a  
12 malleable one tied to the facts of each case,” and “district courts are vested with ‘broad  
13 latitude’ to ‘decide how to test an expert’s reliability’ and ‘whether or not an expert’s  
14 relevant testimony is reliable.’” *Murray v. S. Route Mar. SA*, 870 F.3d 915, 922–23 (9th Cir.  
15 2017) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152–53 (1999)).

16        “Trial courts must exercise reasonable discretion in evaluating and in determining  
17        how to evaluate the relevance and reliability of expert opinion testimony.” *United States v.*  
18        *Sandoval-Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006). A district court serves as “a  
19        gatekeeper, not a fact finder.” *Id.* at 654. “The test ‘is not the correctness of the expert’s  
20        conclusions but the soundness of his methodology,’ and when an expert meets the threshold  
21        established by Rule 702, the expert may testify and the fact finder decides how much weight  
22        to give that testimony.” *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 814  
23        (9th Cir. 2014) (quoting *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010)). When the  
24        methodology is sound, and the evidence relied upon is sufficiently related to the case at  
25        hand, disputes about the degree of relevance or accuracy (above this minimum threshold)  
26        may go to the testimony’s weight, but not its admissibility.

1       **I. Dr. Lamb's economic analyses of the facts and data in this matter are within the  
2 scope of his expertise and are reliable for purposes of Rule 702 and *Daubert*.**

3       Intuitive challenges Dr. Lamb's analyses, conclusions and opinions regarding the  
4 relevant product markets in this case asserting that he has not reliably applied the SSNIP  
5 test. More particularly, Intuitive argues that although Dr. Lamb discusses the SSNIP test in  
6 his report, “[h]is report is devoid of any actual application of the test” because he “did not  
7 conduct any economic analysis to calculate whether a small but significant price increase on  
8 Intuitive's products, such as five percent, would cause a loss in sales volume such that the  
9 price increase would be unprofitable.” Dkt. 129 at p. 4-5.<sup>1</sup> Intuitive then claims that “Dr.  
10 Lamb may not offer opinions about what he speculates the result of a SSNIP test would  
11 have been had he performed one.” Id. at p. 7. In essence, Intuitive attempts to preclude Dr.  
12 Lamb from utilizing the SSNIP framework at all, because he didn't perform a specific  
13 SSNIP calculation. Intuitive's approach ignores that Dr. Lamb applied the SSNIP test in a  
14 perfectly acceptable manner as an analytical framework, as discussed further below.

15       **A. Dr. Lamb's opinion that minimally invasive soft tissue surgical robots  
16 (MIST Surgical Robots) constitute a relevant antitrust product market  
is supported by, among other factors, his qualitative consideration of the  
SSNIP test.**

17       “Congress prescribed a pragmatic, factual approach to the definition of the relevant  
18 market and not a formal, legalistic one.” *Brown Shoe Co. v. United States*, 370 U.S. 294,  
19 336 (1962). Thus, the Ninth Circuit recognizes that “[d]efinition of the relevant market is a  
20 factual question ‘dependent upon the special characteristics of the industry involved.’” *St.*  
21 *Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 783–84 (9th  
22 Cir. 2015).

23  
24  
25  
26       <sup>1</sup> References to Intuitive's Motion are to the docket entry of the publicly filed brief at  
27 Dkt. 129 and the page number within the brief, while references to exhibits attached to the  
Motion reference the exhibit numbers of the Bass declaration available at Dkt. 129-1. The  
under-seal Motion and exhibits are available at Dkt. 130-20-23, with Dkt. 130-21  
28 corresponding to Bass Dec. Ex. 1.

1 Dr. Lamb identifies the so-called “SSNIP” test as one of the tools economists rely  
 2 upon in defining relevant antitrust product and geographic markets. Bass Dec. Ex. 1, ¶ 27,  
 3 n. 72. Dr. Lamb explains that:

4 [T]he SSNIP test is used by the FTC and the DOJ to define relevant  
 5 economic markets. The SSNIP test is intended to ascertain whether  
 6 a hypothetical monopolist can exercise market power in a relevant  
 7 product or geographic market. If the hypothetical monopolist is able  
 8 to permanently (that is, in a “non-transitory” way) raise prices for a  
 9 product or group of products by a “small but significant” amount,  
 10 usually assumed to be five percent, without losing so much in sales  
 11 volume that the increase in price is unprofitable, then that product  
 12 or group of products constitutes a relevant antitrust product  
 13 market.”

14 Id. Dr. Lamb further points out that the FTC and DOJ recognize that:

15 Even when the evidence necessary to perform the hypothetical  
 16 monopolist test quantitatively is not available, the conceptual  
 17 framework of the test provides a useful methodological tool for  
 18 gathering and analyzing evidence pertinent to customer substitution  
 19 and to market definition.

20 Id. Intuitive does not dispute the accuracy of Dr. Lamb’s general statements about the  
 21 SSNIP test or the description of its use by the FTC and DOJ. Dkt. 129 at p. 5.

22 Dr. Lamb explains the relevance of the SSNIP test’s conceptual framework to  
 23 defining a relevant antitrust market in terms of its use as a methodological tool:

24 That is, a relevant market should contain all the products which are  
 25 substitutable for each other in the face of small but significant, non-  
 26 transitory price increases; an analysis of the relevant market thus  
 27 necessarily focuses on an analysis of *economic* substitutability.

28 Bass Dec. Ex. 1, ¶ 27. Relying on his training and experience in economics, Dr. Lamb  
 29 researched and analyzed the market for MIST Surgical Robots. Id. Dr. Lamb concluded that  
 30 there are no economic substitutes for minimally invasive soft tissue surgeries performed  
 31 with MIST Surgical Robots and that MIST Surgical Robots are a necessary input in  
 32 performance of those surgeries. Bass Dec. Ex. 1, ¶¶ 26, 27. Based on his analysis, Dr.  
 33 Lamb determined that the market for MIST Surgical Robots constitutes a relevant antitrust  
 34 product market, and that sales of da Vinci surgical robots occur in this relevant antitrust  
 35 market. Bass Dec. Ex. 1, ¶ 27.

1 product market. Bass Dec. Ex. 1, ¶ 27. Lamb's opinion has a reliable basis in his knowledge  
2 of and experience in the field of economics.

3           Contrary to what Intuitive implies in its motion, Dr. Lamb does not purport to  
4           quantitatively apply the SSNIP test in the context of this case anywhere in his expert report.  
5           See e.g., Bass Dec. Ex. 1, ¶ 29. This is quite understandable because sufficient price change  
6           data is often unavailable in a market dominated by one company that does not frequently  
7           change its prices, such as Intuitive. Because Dr. Lamb never purports to perform or  
8           potentially perform a specific SSNIP calculation that Intuitive complains of, there is simply  
9           nothing to exclude.

**B. Intuitive's legal authorities are inapplicable and do not preclude the admissibility of Dr. Lamb's opinions regarding the definition of relevant antitrust markets in this case.**

Based on the incorrect premise that Dr. Lamb misapplied the SSNIP calculation,  
13 Intuitive argues that “[w]hen an expert offers an opinion on market definition, courts  
14 routinely exclude expert opinions that do not reliably apply the SSNIP test.” Dkt. 129 at p.  
15  
16 4. As support for this proposition, Intuitive cites to *Ky. Speedway, LLC v. Nat'l Ass'n of*  
17 *Stock Car Auto Racing, Inc.*, 588 F.3d 908, 918 (6th Cir. 2009). Id. Intuitive’s reliance on  
this case, and other cases cited in its motion, is misplaced.

18        In *Kentucky Speedway*, the expert entirely failed to consider “a broader range of  
19 potential substitutes.” *Id.* Dr. Lamb did not ignore the potential substitute for robotic  
20 instruments; he extensively analyzed them. Bass Dec. Ex. 1, ¶¶ 29, 31-46. Moreover, in  
21 *Kentucky Speedway*, the expert did not employ the SSNIP framework either quantitatively  
22 or qualitatively. Rather than evaluating quantitative or qualitative evidence of potential  
23 “consumer substitution,” the expert simply “looked at average Sprint Cup ticket prices and  
24 attendance figures over an eight-year span and concluded that both price and demand  
25 increased.” *Ky. Speedway*, 588 F.3d at 918. In contrast to the expert in *Ky. Speedway*, Dr.  
26 Lamb’s analysis does employ the SSNIP conceptual framework to examine practical indicia  
27 of economic substitutability, but he does not claim to have defined the relevant antitrust

1 market through additional quantitative calculations made in accordance with the definition  
 2 of the SSNIP test.

3 Intuitive's reliance on *Teradata Corp. v. SAP SE*, 570 F. Supp. 3d 810 (N.D. Cal.  
 4 2021) is also misplaced. In *Teradata*, the antitrust expert's methodology for defining the  
 5 tying product market was challenged because the challenged expert proffered a *quantitative*  
 6 analysis to corroborate his *qualitative* analysis and claimed to have applied the  
 7 "hypothetical monopolist" test (*i.e.*, SSNIP) test. *Id.* at 838-39. The district court in  
 8 *Teradata* excluded the expert's testimony because his quantitative hypothetical monopolist  
 9 test did not measure the cross-elasticity of demand or the substitutability of products based  
 10 on reliable quantitative analyses.<sup>2</sup> *Id.* at 841. There is no dispute here that Dr. Lamb  
 11 performed a comprehensive analysis of demand between different products and markets.<sup>3</sup>

12 Intuitive also relies on *In re Live Concert Antitrust Litigation*, 863 F. Supp. 2d 966  
 13 (C.D. Cal. 2012), contending that the district court in that case "confronted a similar issue."  
 14 Dkt. 129 at p. 5. Again, Intuitive is mistaken. In *In re Live Concert*, the district court found  
 15 that the expert's purported market definition was "neither sufficiently reliable nor  
 16 sufficiently helpful to the trier of fact to warrant admission under Rule 702" because the  
 17 expert's analysis "fails to comport with his 'chosen methodology' (*i.e.*, the 'SSNIP'  
 18 methodology) . . . ." *Id.* at 994. Unlike the antitrust expert challenged in *In re Live Concert*,  
 19 Dr. Lamb does not invoke nor apply the specific calculations called for by the SSNIP  
 20 methodology, and consequently, the *In re Live Concert* decision has no applicability here.

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22 <sup>2</sup> The antitrust expert conducted the SSNIP test using aggregate diversion ("ADR") analysis  
 23 of "Customer Relationship Management" ("CRM") data. *Teradata*, 570 F. Supp. 3d at 839.  
 24 The district court noted that the data used in the expert's ADR analysis was flawed and that  
 25 the ADR analysis itself has "rarely been accepted by the courts." *Id.* at 839-841.

26 <sup>3</sup> Intuitive's reliance on *Allen v. Dairy Mktg. Servs., LLC*, 2013 WL 6909953, at \*7, 9 (D.  
 27 Vt. Dec. 31, 2013) and *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, 838 F.3d 327  
 28 (3d Cir. 2016) is thus misplaced. In *Allen*, the antitrust expert purported to have actually  
 measured a small but significant non-transitory increase in price to support his definition of  
 the relevant geographic market, but in fact failed to calculate a critical loss threshold as part  
 of a SSNIP calculation. *Allen v. Dairy Mktg. Servs., LLC*, 5:09-cv-00230-cr, Dkt. 470 at p.  
 11 (D. Vt. Dec. 31, 2013). In *Penn State Hershey Med. Ctr.*, an attempted district court  
 application of the SSNIP test was rejected because "its decision reflects neither the proper  
 formulation nor the correct application of that test." 838 F.3d at 336, 339.

1           **C. Dr. Lamb employs reliable methodology for analyzing practical indicia  
2           of economic substitutability.**

3           Intuitive complains that Dr. Lamb “did not reliably apply the SSNIP methodology to  
4           test his conclusion, instead he just offered circular reasoning that relied on that conclusion  
5           as a basis to assume that the SSNIP test would corroborate it.” Dkt. 129 at p. 6. Intuitive  
6           further argues that “Dr. Lamb’s report does not provide a reason why he did not analyze  
7           pricing and volume data in the case to properly implement the SSNIP test” and he “has done  
8           nothing to perform the calculations needed to know how the marketplace would react to ‘a  
9           small but significant increase in price.’” Id. Again, this is simply another way of arguing  
10           that Dr. Lamb was required to perform a specific quantitative analysis, which is wrong as  
11           described above.

12           Antitrust plaintiffs must define a relevant product market, which must “encompass  
13           the product at issue as well as all economic substitutes for the product.” *Newcal Indus., Inc.*  
14           *v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008). Including economic substitutes  
15           ensures that the relevant product market encompasses the sellers or producers who have the  
16           actual or potential ability to deprive each other of significant levels of business. *Pistacchio*  
17           *v. Apple Inc.*, No. 4:20-cv-07034-YGR, 2021 WL 949422, at \*1 (N.D. Cal. Mar. 11, 2021).  
18           Dr. Lamb sets forth all of the data, documents, and testimony that he uses in his analysis,  
19           and provides a fully elaborated and detailed explanation for each component of his  
20           analysis.<sup>4</sup> Based upon the analysis of pertinent facts and data, Dr. Lamb concludes that there

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21           <sup>4</sup> There is no “circular reasoning” present in Dr. Lamb’s analyses. Dr. Lamb examined  
22           numerous factors including sensitivity to price changes, consistent with the SSNIP  
23           framework. *See* Bass Dec. Ex. 1, ¶ 30. Dr. Lamb analyzes evidence demonstrating that the  
24           availability of laparoscopic instruments as a potential substitute has not disciplined  
25           Intuitive’s pricing of robotic surgical instruments. Id. Dr. Lamb analyzes evidence  
26           demonstrating that surgical robot instruments have distinctive characteristics from  
27           laparoscopic surgery instruments. Id. at ¶¶ 18-20, 38-39. Dr. Lamb analyzes evidence  
28           demonstrating that surgical robot instruments have distinctive uses from laparoscopic and  
open surgery instruments. Id. at ¶¶ 10-15. Dr. Lamb analyzes evidence demonstrating that  
surgical robot surgery customers are distinct from laparoscopic and open surgery customers.  
Id. at ¶¶ 40-41, 44. Dr. Lamb analyzes evidence establishing that Intuitive manufactures  
only robotic surgical instruments and does not manufacture laparoscopic or open  
instruments. Additionally, Dr. Lamb analyzes evidence that Intuitive itself perceived robotic  
surgical devices as a distinct market that does not include laparoscopic instruments. Id. at ¶¶  
32-34. Dr. Lamb analyzes medical journals and financial analyst reports (produced from

1 are no economic substitutes for minimally invasive soft tissue surgeries performed with  
 2 MIST Surgical Robots and that MIST Surgical Robots are a necessary input in performance  
 3 of those surgeries. Bass Dec. Ex. 1, ¶¶ 27-48.

4 Questions about the correctness of an expert's conclusions "are a matter of weight,  
 5 not admissibility." *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1199 (9th Cir. 2014).  
 6 Any supposed weaknesses in the opinions and methodologies offered by Dr. Lamb based on  
 7 his using the SSNIP test as a conceptual framework, rather than as a talismanic calculation,  
 8 are appropriately addressed not by exclusion before trial, but by vigorous cross-examination  
 9 during trial. Dr. Lamb's market definition opinion should not be excluded.

10

11 **II. Dr. Lamb's opinion that Intuitive priced above competitive levels and achieved  
 12 high margins for da Vinci robots and EndoWrist instruments is reliable and  
 13 admissible expert opinion evidence on the issue of Intuitive's monopoly power.**

14 Intuitive argues that Dr. Lamb's opinions that Intuitive has exercised monopoly  
 15 power "are inadmissible because they are contrary to law and not based on reliable  
 16 principles." Dkt. 129 at p. 7. More specifically, Intuitive attacks one of the numerous  
 17 indications Dr. Lamb relies on to conclude that Intuitive exercises monopoly power in the  
 18 market for MIST Surgical Robots<sup>5</sup>: charging supracompetitive prices and achieving high  
 19 margins, well above marginal costs. Id. Intuitive contends that Dr. Lamb's analysis of  
 20 Intuitive's prices relative to its marginal costs is inadmissible, as a matter of law, because he  
 21 allegedly did not consider Intuitive's total costs, including fixed costs like research and  
 22 development. Id.

23

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24 Intuitive's own files) showing industry recognition that surgical robots are a distinct market.  
 25 Id. at ¶¶ 83, 89 and n. 201.

26 <sup>5</sup> Dr. Lamb opines that Intuitive possesses monopoly power in the market for MIST  
 27 Surgical Robots in the United States during the relevant period. Bass Dec. Ex. 1 at p. 48. In  
 28 arriving at this opinion, Dr. Lamb analyzed a number of indicia, including (i) Intuitive's  
 domination of the market for MIST Surgical Robots in the United States during the relevant  
 period; (ii) significant barriers to entry into the market for MIST Surgical Robots in the  
 United States during the relevant period; and (iii) Intuitive's prices for the da Vinci surgical  
 robots greatly exceeded marginal costs. Bass Dec. Ex. 1, ¶¶ 80-107.

1                   **A. Dr. Lamb's analysis of Intuitive's pricing relative to marginal costs**  
 2                   **employs reliable methodology recognized in the field of economics to**  
 3                   **demonstrate supracompetitive pricing.**

4                   Experts in economics recognize that one measure of market power is the ability of a  
 5                   firm to price in excess of marginal cost.

6                   For the competitive firm, price equals marginal cost; for the firm  
 7                   with monopoly power, price exceeds marginal cost. Therefore, a  
 8                   natural way to measure monopoly power is to examine the extent to  
 9                   which the profit-maximizing price exceeds marginal cost.

10                  Bass Dec. Ex. 1, ¶ 99 (citing in n. 240, Pindyck & Rubinfeld (8th edition) at p. 371). Dr.  
 11                  Lamb also cites to the Lerner Index which relies upon marginal cost to measure the degree  
 12                  of monopoly power in his expert report and states:

13                  In 1934, economist Abba Lerner proposed the price-cost margin as  
 14                  ‘the index of the degree of monopoly power,’ commonly known as  
 15                  the Lerner Index. Economists often use this index to measure  
 16                  market power, where the larger the Lerner Index is, the greater is  
 17                  the degree of monopoly power.

18                  Bass Dec. Ex. 1, ¶ 99.<sup>6</sup> The Lerner Index is discussed in the treatise by Pindyck &  
 19                  Rubinfeld (8th edition) at p. 371. Id. at ¶99, n. 242.<sup>7</sup> Another standard economic textbook,  
 20                  cited by Dr. Lamb in his expert report, discusses the relationship of price to marginal cost  
 21                  and how that analysis informs determining monopoly power.

22                  In contrast to a price-taking competitive firm, a monopoly knows  
 23                  that it can set its own price and that the price chosen affects the  
 24                  quantity it sells. A monopoly can set its price above its marginal  
 25                  cost but does not necessarily make a supracompetitive profit. For  
 26                  example, if a monopoly incurs a fixed cost, its profit may be zero  
 27                  (the competitive level) even if its price exceeds its marginal cost. It  
 28                  is common practice to say that whenever a firm can profitably set its  
 29                  price above its marginal cost without making a loss, it has  
 30                  monopoly power or market power.

31                  Bass Dec. Ex. 1, ¶100 (citing at n. 243, Carlton & Perloff at p. 117).

32                  In other words, as Dr. Lamb states in his report, “one indication of Intuitive’s  
 33                  exercise of monopoly power in the market for MIST Surgical Robots is the fact that da

34                  <sup>6</sup> The Lerner Index is defined as: “If P = price and C = marginal cost, then the index of the  
 35                  degree of monopoly power is  $(P-C)/P$ ” see A.P. Lerner, “The Concept of Monopoly and the  
 36                  Measurement of Monopoly Power,” The Review of Economic Studies, Vol. I, No.3, 1934,  
 37                  157-175 at p. 169.

38                  <sup>7</sup> By construction, the Lerner Index is always between zero and one; for a perfectly  
 39                  competitive firm, price equals marginal cost; so, the Lerner’s index equals zero.

1 Vinci robot prices were set well above marginal costs.” Bass Dec. Ex. 1, ¶ 102. Dr. Lamb  
 2 cites to internal Intuitive documents that showed Intuitive’s “global Systems business unit  
 3 earned contribution margins of 65.1 percent and 60.0 percent in 2019 and 2020,  
 4 respectively.” Id. Dr. Lamb’s expert report points out that Intuitive itself acknowledges that  
 5 the prices for da Vinci robots are set well above marginal costs. Bass Dec. Ex. 1, ¶¶ 103-  
 6 104.

7 **B. Dr. Lamb’s analysis is consistent with numerous courts that have held  
 pricing above marginal cost is evidence of supracompetitive pricing.**

8 Assessing a firm’s market power in terms of its ability to charge a supracompetitive  
 9 price is not a novel concept or methodology that Dr. Lamb invented for the purposes of this  
 10 litigation. Rather it is a well-recognized economic principle that has been applied in many  
 11 cases. “Market power is defined as the ability to charge a supracompetitive price — a price  
 12 above a firm’s marginal cost.” Herbert Hovenkamp, *Federal Antitrust Policy: The Law of*  
 13 *Competition and Its Practice*, §§3.1, 3.1a (4th ed. 2011); *Food Lion, LLC v. Dean Foods*  
 14 *Co. (In re Se. Milk Antitrust Litig.)*, 739 F.3d 262, 277 (6th Cir. 2014); *In re Nexium*  
 15 *(Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 389 (D. Mass. 2013) (holding that  
 16 “direct evidence of [market] power is available” where a party sold a product “at prices well  
 17 in excess of marginal costs, and substantially in excess of the competitive price, and  
 18 enjoyed high profit margins”); *In re Aggrenox Antitrust Litig.*, 199 F. Supp. 3d 662, 667 (D.  
 19 Conn. 2016) (“prices in a competitive market will tend (perhaps asymptotically) toward  
 20 marginal cost, so prices substantially above that cost are supracompetitive by definition.”).

21 Intuitive argues that Dr. Lamb’s opinion on monopoly power should be excluded as  
 22 unreliable and contrary to law because he did not take into account fixed costs like research  
 23 and development. However, even those Federal district courts that have required evidence  
 24 of fixed costs in addition to marginal cost only do so in specific circumstances where fixed  
 25 costs are a unique concern. *See In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*,  
 26 No. CV 14-MD-02503, 2018 WL 563144, at \*11 (D. Mass. Jan. 25, 2018) (finding that  
 27 sunk costs “are relevant to the inquiry because in a market with high fixed costs like the

1 pharmaceutical industry, ‘even competitive prices may exceed marginal cost’”). Even in  
 2 such an industry, district courts are split as to whether fixed costs are required. *See In re*  
 3 *Aggrenox Antitrust Litig.*, 199 F. Supp. 3d 662, 667 (D. Conn. 2016) (rejecting brand  
 4 manufacturers’ sunk costs argument because the fact that “brand manufacturers incur  
 5 enormous fixed costs developing and marketing new drugs . . . does not mean that the price  
 6 of the brand drug is not supracompetitive,” and stating that the “generally accepted  
 7 economic means of analyzing the probability that given prices are supracompetitive [is]  
 8 using price and marginal cost”).

9 In its motion to exclude, Intuitive relies heavily on *Kaiser Foundation v. Abbott*  
 10 *Laboratories*, 2009 WL 3877513 (C.D. Cal. Oct. 8, 2009). But that case does not deal with  
 11 whether an expert’s testimony where the marginal cost component of the analysis focusing  
 12 on supracompetitive pricing failed to account for fixed costs was admissible or not. In  
 13 *Kaiser*, the court also rejected plaintiff’s argument that monopoly power was established by  
 14 the defendant’s supracompetitive pricing, which plaintiff sought to prove with nothing more  
 15 than evidence that defendant’s drug costs more than a generic drug. *Kaiser Foundation v.*  
 16 *Abbott Laboratories, et al.*, CV 02-2443-JFW, Dkt. 399 at p. 10 (October 8, 2009). The  
 17 court in *Kaiser* noted that plaintiff’s own expert conceded that the pricing difference  
 18 between a brand name drug and its generic equivalent does not reflect supracompetitive  
 19 pricing, based on the fact that companies that produce generics do not incur the substantial  
 20 research and development expenses incurred by companies that develop and produce brand  
 21 name drugs. *Id.* There is no discussion in the *Kaiser* decision of marginal costs or the proper  
 22 legal approach to calculating marginal costs, and no mention of any requirement to include  
 23 fixed costs as part of a supracompetitive pricing analysis for a robotic device with 99%  
 24 market share.<sup>8</sup>

25  
 26 <sup>8</sup> Intuitive also cites three other cases in passing: *United States v. Eastman Kodak Co.*, 63  
 27 F.3d 95, 109 (2d Cir. 1995), *In re Remeron Direct Purchaser Antitrust Litig.*, 367 F. Supp.  
 2d 675, 681 n.10 (D.N.J. 2005), and *Carpenter Tech. Corp. v. Allegheny Techs. Inc.*, 2011  
 28 WL 4528303, at \*12 (E.D. Pa. Sept. 30, 2011). None of these three cases is controlling legal  
 authority in the Ninth Circuit. Additionally, none of these cases present a substantive  
 analysis of the issue raised by Intuitive in challenging Dr. Lamb’s monopoly power opinion

1        In sum, this Court should reject Intuitive's argument that Dr. Lamb's opinion  
 2 regarding Intuitive's monopoly power in the MIST Surgical Robot market, based in part on  
 3 his analysis of Intuitive's supracompetitive pricing, is inadmissible as a matter of law. An  
 4 additional "fixed costs" analysis is not necessary for Dr. Lamb's analysis of  
 5 supracompetitive pricing to be "reliable" for purposes of Fed. R. Evid. 702.

6

7        **III. Dr. Lamb properly relies upon Mr. Phil Phillips' opinions as corroborating  
 8 other evidence cited in Dr. Lamb's report relevant to Intuitive's patient safety  
 9 claims.**

10      Intuitive argues that Dr. Lamb as an economist is offering opinions about product  
 11 safety that he is not qualified to offer. Dkt. 129 at p. 10. More specifically, Intuitive claims  
 12 that Dr. Lamb intends to offer his opinion that "EndoWrists modified by third parties were  
 13 equally as safe as new instruments manufactured by Intuitive." Dkt. 129 at p. 11. Dr. Lamb  
 14 is not guilty of the charge Intuitive brings against him.

15

16      In his expert report, Dr. Lamb addresses the Intuitive Service Agreement's terms  
 17 that state that the license to use EndoWrist instruments expires when the designated number  
 18 of lives have all been used. Bass Dec. Ex. 1, ¶ 128. Dr. Lamb also indicates he understands  
 19 that Intuitive claims this requirement was necessary due to patient safety concerns  
 20 associated with allowing third parties to repair its EndoWrist surgical instruments. Id.

21

22      Thereafter, Dr. Lamb examines a recent action taken by the FDA with respect to a  
 23 510(k) clearance for the marketing of reprocessed Intuitive Surgical da Vinci model S/Si  
 24 EndoWrist instruments by a company called Iconocare Health ("Iconocare") and references  
 25

26

27      focusing on his consideration of Intuitive's da Vinci surgical robot pricing versus marginal  
 28 costs. For example, in *Kodak* the district court noted that the use of the Lerner index was  
 29 inappropriate because Kodak film is not a product differentiated from the film sold by its  
 30 rivals. *Kodak*, 63 F.3d at 109. In *In re Remeron*, the district court found that plaintiffs  
 31 provided "no evidence of excessive price-cost margins or restricted output but merely rely  
 32 on the fact that later generic manufacturers could enter the market more cheaply than  
 33 Remeron's price in order to establish monopoly power." 367 F. Supp. 2d at 682. In  
 34 *Carpenter Tech.*, the district court made no mention of nor did it make any evidentiary  
 35 ruling on how to calculate marginal costs, or whether admissibility under the law required  
 36 calculation or consideration of fixed costs as part of marginal costs. *Carpenter Technology  
 37 Corp. v Allegheny Technologies, Inc.*, 5:08-cv-02907-LC, Dkt 102 at pp. 23-25 (September  
 38 30, 2011)).

1 the FDA's conclusion as reflected in its September 2022 letter to Iconocare. Bass Dec. Ex.  
 2 ¶ 129. Based upon a telephone conversation Dr. Lamb had with SIS's regulatory expert,  
 3 Mr. Philip Phillips, he was aware that Mr. Phillips was also analyzing the FDA's action  
 4 with respect to Iconocare. Bass Dec. Ex. 1, ¶ 129 and n. 307. Based on that conversation,  
 5 Dr. Lamb references his understanding of the opinions Mr. Phillips reached about the  
 6 significance of the FDA's action with respect to Iconocare. Bass Dec. Ex. 1, ¶¶ 129-130.

7 Dr. Lamb states at paragraph 131 of his report that he is relying on Mr. Phillips  
 8 opinion regarding the FDA's assessment of the safety of reprocessed EndoWrist surgical  
 9 instruments as compared to Intuitive's newly manufactured replacement EndoWrist surgical  
 10 instruments, as well as on the additional evidence he has reviewed that is consistent with  
 11 Mr. Phillips' conclusions:

12  
 13 "For the purposes of my analysis contained in this Expert Report, I  
 14 rely on the opinions of Mr. Philip Phillips regarding the FDA's  
 15 assessment of the safety of reprocessed EndoWrist surgical  
 16 instruments as compared to Intuitive's newly manufactured  
 17 replacement EndoWrist surgical instruments. Additional evidence I  
 18 have reviewed is consistent with Mr. Phillips' conclusions regarding  
 19 the FDA's assessment of the safety of reprocessed EndoWrist  
 20 instruments. For example, at deposition, Nicky Goodson, Senior  
 21 Director for Service Operations at Intuitive, testified that Intuitive  
 22 has not done testing of any kind to determine whether refurbished or  
 23 repaired EndoWrists performed by third-party repairers similar to  
 24 SIS would be unsafe to use with the da Vinci surgical robot in  
 25 MIST surgery. Ms. Goodson further testified:

26  
 27 Q. Aside from your personal opinion, do you have any  
 28 evidence that Endo Wrists repaired or refurbished by Restore or  
 Rebotix have put patients at risk?

A. No.

29  
 30 Grant Duque, Director of Core Instruments Design Engineering at  
 31 Intuitive, similarly testified that he was not aware of any testing that  
 32 had been done on refurbished EndoWrist instruments performed by  
 33 third-party repairers similar to SIS.<sup>315</sup> Furthermore, at deposition,  
 34 Dan Jones, Intuitive's Director of External Affairs, testified that  
 35 when sending letters outlining patient safety claims to hospitals that  
 36 were using third party repairers to refurbish EndoWrist instruments,  
 37 he was unaware of the types of tests those third-party repairers were  
 38 performing to ensure the safety of the EndoWrist instruments they  
 39 refurbished.<sup>316</sup>"

40 Bass Dec. Ex. 1, ¶ 131.

1 It is at this point in Dr. Lamb's report that Intuitive takes issue with his reliance on  
 2 Mr. Phillips' conclusions in the allegedly offending paragraph 132. Dkt. 129 at p. 10. Dr.  
 3 Lamb states:

4 The evidence discussed above [in ¶¶ 129-131] is consistent with the  
 5 opinions contained in Mr. Phillips' expert report that, despite  
 6 Intuitive's claims to the contrary, EndoWrist instruments repaired or  
 7 reprocessed by third parties such as SIS were equally as safe as the  
 8 newly manufactured replacement Endo Wrist instruments hospitals  
 9 were required to purchase directly from Intuitive.<sup>9</sup>

10 Bass Dec. Ex. 1, ¶ 132. Dr. Lamb stated earlier in his report his understanding of Mr.  
 11 Phillips' conclusions:

12 I understand Mr. Phillips concludes that Iconocare provided  
 13 performance data to the FDA that demonstrated that the reprocessed  
 14 devices are as safe and effective as the predicate devices and  
 15 operate as originally intended. I also understand that Mr. Phillips  
 16 further asserts that it is not surprising that FDA determined the  
 17 Iconocare EndoWrist device to be substantially equivalent, as it is  
 18 virtually identical to the predicate devices in all respects and one  
 19 would anticipate that they are as safe and effective. Based on Mr.  
 20 Phillip's analysis of the FDA's recent clearance of reprocessed  
 21 EndoWrist instruments, I understand Mr. Phillips has concluded  
 22 that Intuitive's claims that it is unsafe to use EndoWrist surgical  
 23 instruments more than the maximum number of times imposed by  
 24 Intuitive appears to be inconsistent with the determination made  
 25 recently by the FDA.

26 Bass Dec. Ex. 1, ¶ 130.

27 Intuitive does not assert that Mr. Phillips' opinions in this case fail to include the  
 28 conclusions Dr. Lamb references in paragraph 130 of his report. Further, Intuitive does not  
 29 appear to be seeking to exclude Dr. Lamb's reliance on Mr. Phillips' expert opinion  
 30 assessing the meaning and significance of the FDA / Iconocare action. Dr. Lamb relies on  
 31 Mr. Phillips' opinions and other evidence as support for his opinion questioning the  
 32 legitimacy of Intuitive's product safety justification for tying the expiration of the limited

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1 EndoWrist instrument license to the expiration of the limited number of uses Intuitive  
 2 imposes with its use counter.

3 Perhaps one might quibble about Dr. Lamb's characterization of Mr. Phillips'  
 4 opinion referenced in the allegedly offending paragraph 132 in isolation. But that is not a  
 5 legitimate basis for excluding any portion of Dr. Lamb's opinion (including paragraph 132)  
 6 in its proper context, for example, as reflected in the preceding paragraphs 129-131 in his  
 7 report. Intuitive's motion to exclude should be denied as to this issue.

8 **CONCLUSION**

9 For all of the reasons stated above, SIS respectfully requests that the Court deny  
 10 Intuitive's motion to exclude Dr. Russell Lamb's opinions in this matter.

11  
 12 Dated: April 20, 2023

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